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NO. 82-986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MARYLAND,

Petitioner

v.

ROBERT DIEHL,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does interpretation of the Maryland disorderly conduct statute by the Maryland Court of Appeals present a substantial federal question?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 294 Md. 466, 451 A.2d 115 (1982).

JURISDICTION

Respondent was convicted of disorderly conduct and resisting arrest by a jury in the Circuit Court for Washington County on May 26, 1980. Respondent appealed his conviction to the Court of Special Appeals. Prior to reaching the merits, the intermediate court, under Maryland Rule 1015(a), certified the case to the Court of Appeals of Maryland. That Court reversed the convictions of the Circuit Court in Diehl v. State, 294 Md. 466, 451 A.2d 115 (1982).

The jurisdiction of this Court to review the decision of the Court of Appeals of Maryland is invoked by the State of Maryland under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On January 8, 1980, at approximately 10:25 p.m., Vincent Gavin, Chief of Police in Hancock, Maryland, was on patrol in Hancock. Observing a car "squealing wheels" on Main Street, Gavin pursued the vehicle and pulled it over into an A & P parking lot. Gavin testified that after the vehicle stopped, the driver of the car and Respondent, a passenger, got out. Gavin ordered both men to get back into the car. The driver complied, but Respondent refused to obey the order. As Gavin repeated it, Respondent began shouting, "Fuck you, Gavin; I know my rights; you can't tell me what to do" and so forth. Gavin advised Respondent that his "dealings weren't with him, they were with the driver." He again ordered Diehl to get back into the car. He informed Respondent that if he did not obey the order, he was going to be arrested. Respondent continued to refuse. During this exchange, a crowd had begun to gather. Gavin arrested Respondent for "screaming obscenities and ... drawing a crowd."

Gavin presented no testimony that he was provoked in any way by Respondent's language.

Gavin further testified that Respondent refused to submit to arrest. Respondent, after being handcuffed and placed in a patrol car, escaped and was later recaptured by a State policeman. He again resisted arrest.[1]

Respondent was charged with two counts of assault and battery, two counts of resisting arrest, and disorderly conduct. In the trial in the Circuit Court for Washington County, the jury convicted Respondent of disorderly conduct and two counts of resisting arrest but found him not guilty of the assault charges. He was sentenced to three consecutive terms: thirty days for disorderly conduct and three years for each charge of resisting arrest.

Respondent appealed his conviction to the Court of Special Appeals of Maryland. Before reaching a decision, that Court certified the entire matter to the Court of Appeals of Maryland under Maryland Rule 1015(a). The Court of Appeals issued its writ of certiorari to consider the issues presented. The Court of Appeals determined that under applicable Maryland law, Respondent's conduct was not disorderly. Thus, Gavin's arrest of Respondent was unlawful and Respondent's language was "precipitated by an unlawful police order." Maryland law permits one illegally arrested to use any reasonable means to effect his escape. The Court held that Respondent used reasonable force in resisting the unlawful arrest; therefore, judgments of acquittal on all counts should have been granted.

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[1]Respondent's testimony contradicted much of Gavin's. He denied using the language attributed to him, admitting, however, to telling Gavin he was "full of shit" and "a crazy son-of-a-bitch." He also testified that after he was arrested, Gavin began beating him. He denied assaulting either of the officers.

REASONS FOR DENYING THE WRIT

Although the Petitioner has drafted the first question as a First Amendment issue, the issue litigated in the Court of Appeals of Maryland was the sufficiency of the evidence to establish a violation of Maryland Code, Article 27, §121 (1957, 1982 Repl. Vol.) and resisting arrest. The Court of Appeals concluded that Respondent had not wilfully disturbed anyone in violation of the statute and that his language was not obscene language proscribed by the statute. (Petition, Apx. 7-10). These questions are, of course, matters of state law not reviewable by this Court. See Henry v. Mississippi, 379 U.S. 443 (1965).

The only arguable federal question in this case involves the State's theory that Respondent's mere use of the expression "Fuck you, Gavin" as he protested Police Chief Gavin's illegal order[2] amounted to proscribed "fighting words."

The rationale for permitting limitations on the use of "fighting words" is the concern that they will incite violence. In any particular case, the prerequisite for legal recognition of this concern is that the addressee be incited. Thus, no matter what the epithet, if the addressee is "insulted" but not aggravated to fight the words are, of necessity, not "fighting words." People of the City of Oak Park v. Smith, 262 N.W.2d 900 (Mich. App. 1978); Hammond v. Adkisson, 536 F.2d 237 (8th Cir. 1976). See also Downs v. State, 278 Md. 610, 366 A.2d 41 (1976), cert. denied, 431 U.S. 974 (1977). The principle is simply that "words may or may not be 'fighting words', depending upon the circumstances of their utterance." Lewis v. New Orleans, 415 U.S. 130, 135 (1975) (Powell, J., concurring).

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[2] Petitioner characterizes Gavin's order to Respondent to get into the car as "reasonable." (Petition, Apx.12). The question was not whether the order was "reasonable" but, rather, whether it was "lawful." The Court of Appeals found as a matter of state law that the order was "unlawful." (Petition, Apx. 7).

In the case at bar, Respondent had not sought out someone with the intent to abuse him. On the contrary, the words complained of were used in the context of a spirited discussion in which Respondent denounced (correctly) police conduct. Respondent was reacting to Gavin's official conduct not to Gavin as an individual. From Gavin's testimony, it is clear that Gavin understood the gravamen of Respondent's complaint and was not personally insulted, much less incited to violence. Gavin, when asked what the basis for the arrest was, replied, "I arrested him because he was screaming obscenities and he was drawing a crowd." (Petition, Apx. 16). Gavin's reply shows that he in no way felt that Respondent was inciting him to violence. Thus, the record in this case presents an initial and insurmountable burden to Petitioner's "fighting words" argument: "There is ... no showing that anyone who saw [Respondent] was in fact violently aroused or that [Respondent] intended such a result." (emphasis added). Cohen v. California, 403 U.S. 15, 19 (1971).

Petitioner's first question barely presents a federal question. On the basis of the record that question is insubstantial.

Petitioner's second question presents no federal issue whatsoever. The second question is whether, even though the evidence was insufficient to sustain the conviction, the police officers could have arrested Respondent because they had "probable cause" to believe Respondent was guilty of disorderly conduct. Questions concerning authority to arrest and resisting arrest are questions of local law. See John Bad Elk v. United States, 177 U.S. 529 (1900). Petitioner attempts to rectify this deficiency by making a vague reference to the Fourth Amendment. That Amendment serves solely to secure the "right of the people" and gives absolutely no protection to the state. Indeed,

there is only one way in which constitutional provisions designed to protect individuals can provide the basis for a federal question in the appeal of a state. This occurs when a state court has erroneously interpreted the Constitution of the United States as providing more protection to an accused than its framers intended. See Oregon v. Hass, 420 U.S. 714 (1975). No such question is raised in this case. The Fourth Amendment is not even cited by the Court of Appeals and clearly does not provide a basis for the decision.

On the merits, Petitioner's "probable cause" theory cannot withstand even superficial analysis. Petitioner is correct that the general definition of "probable cause" was summarized in Michigan v. DeFillippo, 443 U.S. 31 (1979).

> "'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." (emphasis added) Id. at 349-350.

Probable cause in this sense involves the problem of a police officer who has insufficient facts to be certain that a crime has been committed. In the case at bar, the police officers had all of the facts; the question was whether as a matter of law these facts constituted a crime. Concepts of probable cause simply do not apply to purely legal questions. It is hornbook law that everyone is presumed to know the law and it necessarily follows that "a police officer like any citizen is presumed to know the law." People v. Roach, Misc. 253 N.Y.S.2d 24, 28 (Sup. Ct. 1964). Thus, when an arrest was made on the basis of a statute that had been declared unconstitutional two years prior to the incident it was held that "[a]n unconstitutional law is incapable of being violated as it is in effect a non-entity, and with such status the questions of probable cause does not arise."

People v. Corley, Misc.2d, 397 N.Y.S.2d 875 (Sup. Ct. 1977). Similarly, police officers' mistaken belief that conduct is criminal does not provide an excuse for an arrest when the "offense" imagined by the police does not exist. The police are in no better position than the converse position of the citizen whose unlawful conduct is not excused because of his belief that it is not proscribed by law. See W. LaFave & A. Scott, Criminal Law 362-365 (1972).

In summary, Petitioner has provided no basis for granting the writ. This case is largely controlled by state law and specific facts and any marginal federal question is insubstantial. Moreover, the failure of Petitioner to cite any similar case anywhere in the country reaching a different result sufficiently demonstrates that there is no need for this Court to decide the issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

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BRIEF OF OPPOSITION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 1983, a copy of the Brief in Opposition was hand-delivered to the Office of the Attorney General, Munsey Building, 4th Floor, 7 N. Calvert Street, Baltimore, Maryland 21202.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Robert G. Diehl, who is indigent and who has been found to meet the qualifications of representation by the Office of the Public Defender for the State of Maryland, at the time of his trial and at appellate proceedings thereafter, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this Brief is attached hereto.

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Robert G. Diehl, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? N/A

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? _____

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own any cash or checking or savings account? _____

(a) If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? _____

(a) If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. _____

_____

_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____
ROBERT G. DIEHL

Subscribed and sworn to before me, a Notary Public, this 4th day of March, 1983.

NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUDGE